No. 88-2041 (4)

In the Supreme Court of the United States

OCTOBER TERM, 1989

EVERETT A. SISSON, PETITIONER

v.

BURTON B. RUBY, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

KENNETH W. STARR
Solicitor General
DAVID L. SHAPIRO
Deputy Solicitor General
STEPHEN L. NIGHTINGALE
Assistant to the Solicitor General
Department of Justice
Washington, D.C. 20530
(202) 633-2217

28 pp

QUESTIONS PRESENTED

1. Whether the Limitation of Liability Act, 46 U.S.C. App. 181 *et seq.* (Supp. IV 1986), confers federal subject matter jurisdiction over a proceeding to limit any tort liability of the owner of a recreational vessel arising from a fire that started aboard the vessel while it was docked at a marina.

2. Whether 28 U.S.C. 1333(1) confers federal admiralty jurisdiction over that proceeding.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases:

Cases-Continued Page

Cases-Continued Page

Cases-Continued — Page

Statutes and rule:

Statutes and rule – Continued — Page

Miscellaneous:

In the Supreme Court of the United States

OCTOBER TERM, 1989

No. 88-2041

EVERETT A. SISSON, PETITIONER

v.

BURTON B. RUBY, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

This brief is submitted in response to the Court's order inviting the Solicitor General to express the views of the United States.

STATEMENT

1. Petitioner Everett A. Sisson was the owner of the Ultorian, a 56-foot pleasure yacht. On September 24, 1985, the Ultorian caught fire while it was docked at the Washington Park Marina in Michigan City, Indiana. The yacht was destroyed, and the fire caused extensive damage to the marina and to other vessels in the vicinity. The owners of the marina and the damaged vessels estimate that their losses exceed $275,000. Pet. App. 1a-2a, 25a.

Petitioner commenced this action in a federal district court to obtain the benefits of the Limitation of Liability

Act, 46 U.S.C. App. 181 *et seq.*[1] The complaint alleged that the fire had occurred without petitioner's privity or knowledge. See 46 U.S.C. App. 183(a). It sought a judgment enjoining the pursuit of claims against petitioner for damages arising from the fire, adjudicating petitioner's liability on those claims, limiting petitioner's total liability to the value of his interest in the Ultorian after the casualty (approximately $800), and dividing that sum among any successful claimants.[2] The complaint invoked "the admiralty and maritime jurisdiction of the United States." Compl., ¶¶ 8, 10, 13, prayer.

2. In orders dismissing the complaint and denying petitioner's motion for reconsideration, the district court held that it lacked subject matter jurisdiction. Pet. App. 25a-35a, 37a-41a. In its initial order, the court held that it lacked general admiralty jurisdiction over the action. The district court noted that, under this Court's decisions in *Foremost Insurance Co.* v. *Richardson*, 457 U.S. 668 (1982), and *Executive Jet Aviation, Inc.* v. *City of Cleveland*, 409 U.S. 249 (1972), admiralty jurisdiction over tort claims extends only to wrongs that occur on navigable waters and that bear a "significant relationship to traditional maritime activity." Pet. App. 26a-27a. Observing that the instrumentality blamed for the fire, a washer/dryer, was not

[1] All citations to the Limitation of Liability Act are to Supplement IV to the 1982 edition of the United States Code.

[2] Section 183(a) of the Act provides in pertinent part:

> The liability of the owner of any vessel, whether American or foreign, * * * for any act, matter, or thing, loss, damage, or forfeiture, done, occasioned, or incurred, without the privity or knowledge of such owner or owners, shall not, except in the cases provided for in subsection (b) of this section, exceed the amount or value of the interest of such owner in such vessel, and her freight then pending.

"distinctly maritime in character" and that the casualty did not involve the navigation of a vessel, the court held that the matters giving rise to petitioner's potential liability did not bear the necessary relationship to traditional maritime activity. *Id.* at 31a-32a.

In a motion for reconsideration, petitioner argued that the Limitation of Liability Act, 46 U.S.C. App. 183, provided an independent source of subject matter jurisdiction over the action. The district court denied the motion on three alternative grounds: (1) petitioner's jurisdictional theory could not be presented for the first time in a motion for reconsideration; (2) the Limitation of Liability Act does not confer subject matter jurisdiction over non-maritime tort claims; and (3) the Limitation of Liability Act does not apply to a pleasure craft used for recreational purposes. Pet. App. 37a-41a.

3. The court of appeals affirmed. Pet. App. 1a-21a. Addressing first the availability of admiralty jurisdiction under 28 U.S.C. 1333, the court observed that such jurisdiction was not "precluded * * * simply because the tort [in this case] involves pleasure, rather than commercial, vessels." Pet. App. 6a. However, the court of appeals read *Foremost* "to limit admiralty jurisdiction in non-commercial maritime tort cases to torts involving navigation." *Id.* at 7a-8a. Thus, in the court's view, that jurisdiction extends only (*id.* at 8a)

> to cases directly involving commercial maritime activity, or to cases involving exclusively non-commercial activities in which the wrong (1) has a potentially "disruptive impact" on maritime commerce and (2) involves the "traditional maritime activity" of navigation.

Because it determined that this case "involves only non-commercial activities," the panel applied the second

prong of its test. Pet. App. 8a. The court observed that "a fire on board a moored vessel could disrupt commercial navigation," but it adhered to its "narrow reading of 'traditional maritime activity,' limiting application to cases involving navigation." *Id.* at 8a-9a.[3] Since the Ultorian was docked in a marina at the time of the fire, the court held that it lacked admiralty jurisdiction over the action.

The court of appeals also held that the Limitation of Liability Act did not independently confer subject matter jurisdiction over the action. The panel recognized that in *Richardson* v. *Harmon*, 222 U.S. 96 (1911), this Court held that the Act vested district courts with jurisdiction to

[3] The court acknowledged that its approach was not free from doubt. It observed that there were "[s]trong arguments" for a broader view of admiralty jurisdiction; it described as "puzzling" the fact that *Foremost* had defined admiralty jurisdiction by reference to "traditional maritime activity" while focusing on navigation; and it conceded that its understanding of that jurisdiction might be "too narrow and mechanical an interpretation of the Supreme Court." Pet. App. 9a, 12a. The panel also noted that its definition of admiralty jurisdiction differed from the "'four-factor' test" applied in several other circuits. *Id.* at 8a n.2. However, the court of appeals felt "constrained by" the language of this Court's decisions (*id.* at 10a; see *id.* at 12a), and cited several reasons for declining to extend admiralty jurisdiction to "include fires on pleasure craft as a matter of course." *Id.* at 12a. These included the difficulty of establishing any other limiting principle, "widespread scholarly criticism of the exercise of admiralty jurisdiction over pleasure boat torts," and concerns of federalism. *Id.* at 12a-14a.

In a concurring opinion, Judge Ripple maintained that the majority's "test [would] place inappropriate restrictions on admiralty jurisdiction in other instances." Pet. App. 21a. In his view, *Foremost* did not restrict admiralty jurisdiction in non-commercial cases to "matters directly involving the navigation of a vessel" or preclude "jurisdiction based on other hazards traditionally associated with maritime activities, including fire, when that hazard threatens maritime commerce." *Ibid.* He concurred in the judgment, however, on the ground that the fire in this case – in a marina "dedicated exclusively to the wharfage of pleasure boats" – posed no such threat. *Ibid.*

entertain proceedings to limit liabilities arising from non-maritime torts. However, the court of appeals ruled that the enactment of the Extension of Admiralty Jurisdiction Act, 46 U.S.C. 740, eliminated "the need that inspired that decision," and it questioned whether cases predating *Executive Jet* and *Foremost* retained their precedential force. Pet. App. 16a-17a. The court concluded that the "nexus" required for admiralty jurisdiction was also a prerequisite for jurisdiction under the Limitation of Liability Act. The court explained that "when a cause of action in tort does not bear any connection to traditional maritime activity, there is no justification for allowing the Limitation of Liability Act – which provides for a practice apparently defensible only in a traditional maritime context – to provide an independent basis for admiralty jurisdiction." *Id.* at 18a.[4]

DISCUSSION

The court of appeals' holding that federal courts lack jurisdiction over non-maritime tort claims in limitation of liability proceedings conflicts with this Court's decision in *Richardson* v. *Harmon*, *supra*, and the decisions of lower federal courts. In addition, the court of appeals employed criteria different from those applied in other circuits to determine whether the casualty in this case bore the "significant relationship to traditional maritime activity" required for general federal admiralty jurisdiction. Although the practical impact of these differing standards remains

[4] Because it held that the court lacked subject matter jurisdiction over this action, the court of appeals did not address the question whether the Limitation of Liability Act applies to pleasure vessels. See Pet. App. 20a n.11. The court noted that the lower federal courts have divided on that question.

unclear, the conflict has been perceived as significant in the lower courts.

We believe that this Court's review is warranted because of the conflict with *Richardson*, and because there is a need to dispel confusion as to the reach of the Court's decisions in *Executive Jet* and *Foremost*. If the Court does decide to grant review, it may also wish to direct the parties to brief the issue whether *Richardson* should be reconsidered. Although there are substantial arguments on both sides of that issue, the appropriateness of applying the Limitation of Liability Act to non-maritime tort claims is, in our view, a matter that deserves fresh consideration.

The scope of the district courts' general admiralty jurisdiction over maritime torts need not be reached if the Limitation of Liability Act applies to—and independently confers subject matter jurisdiction over—this case. Accordingly, we address that issue first.

1. Section 183(a) of the Limitation of Liability Act, 46 U.S.C. App. 183(a), provides that "[t]he liability of the owner of any vessel" for any damages occasioned without the owner's "privity or knowledge" shall not exceed "the amount or value of the interest of such owner in such vessel, and her freight then pending." To enforce that limitation, an owner is authorized by Section 185 of the Act, 46 U.S.C. App. 185, to "petition a district court of the United States of competent jurisdiction" to limit his liability. When (as in this case) there are multiple claims against the owner and the amount of those claims exceeds the value of his interest in the vessel, the court has authority to enjoin the commencement and prosecution of any other actions arising out of the casualty; to determine whether the owner is entitled to the statutory limitation on liability (which in many cases turns on whether the casualty was within his "privity or knowledge"); to adjudicate claims

against the owner or vessel; and to apportion the owner's interest in the vessel among successful claimants in proportion to their claims. See G. Gilmore & C. Black, *The Law of Admiralty* § 10-17 (2d ed. 1975). Federal jurisdiction over such a proceeding is exclusive. *See Providence & New York Steamship Co.* v. *Hill Manufacturing Co.*, 109 U.S. 578, 594-595 (1883).

Here, the court of appeals held that exclusive federal jurisdiction does not extend to tort claims that lack a "significant relationship to traditional maritime activity." Although the court framed the question as one of federal jurisdiction, the issue may just as properly be viewed as one of the substantive reach of the Act. The statute has been construed to provide for a proceeding in which the fund available to satisfy a shipowner's liability may be apportioned among all claims subject to the owner's limitation on liability. *See Just* v. *Chambers*, 312 U.S. 383, 386 (1941). Thus, in our view, the scope of federal jurisdiction under the Limitation of Liability Act is the same as the scope of the liabilities that are subject to limitation.[5] The question presented by this case, then, is whether the Act applies to liabilities arising from non-maritime claims.

In its early decisions under the Act, this Court determined that the statute was to be administered by federal courts sitting in admiralty and construed it to apply only to liabilities within the general admiralty jurisdiction of those courts. In *Norwich Co.* v. *Wright*, 80 U.S. (13 Wall.) 104 (1871), the Court resolved the question, on which the statute was silent, of the appropriate forum for enforcement

---

[5] In the admiralty setting, issues of jurisdiction and the reach of substantive rules of law are linked. "With admiralty jurisdiction comes the application of substantive admiralty law." *East River S.S. Corp.* v. *Transamerica Delaval Inc.*, 476 U.S. 858, 864 (1986).

of the Act. The Court concluded (*id.* at 123-124):

> The act does not state what court shall be resorted to, nor what proceedings shall be taken; but that the parties, or any of them, may take "*the appropriate proceedings in any court*, for the purpose of apportioning the sum for which, &c." Now, no court is better adapted than a court of admiralty to administer precisely such relief. * * * Congress might have invested the Circuit Courts of the United States with the jurisdiction of such cases by bill in equity, but it did not. It is also evident that the State courts have not the requisite jurisdiction. Unless, therefore, the District Courts themselves can administer the law, we are reduced to the dilemma of inferring that the legislature has passed a law which is incapable of execution. This is never to be done if it can be avoided. We have no doubt that the District Courts, as courts of admiralty and maritime jurisdiction, have jurisdiction of the matter * * *.[*]

Consistent with *Norwich*'s observation that the district courts had jurisdiction over limitation of liability actions, "as courts of admiralty and maritime jurisdiction," this Court later held that federal court jurisdiction in such proceedings (and thus, of necessity, the substantive reach of the Act itself) extended only to maritime liabilities on which suit could have been brought on the admiralty side of the federal district courts. In *Ex parte Phenix Insurance Co.*, 118 U.S. 610 (1886), the owner of a steamer sought to

---

[*] In view of the Act's silence on matters of procedure in proceedings under the Act, this Court took the extraordinary step of announcing its intention to promulgate rules to regulate those proceedings. *Id.* at 125. The Court subsequently issued "Supplementary Rules in Admiralty" which, with some amendments, are now codified as Supplemental Rule F, Fed. R. Civ. P. See G. Gilmore & C. Black, *supra*, § 10-14.

litigate the question of its negligence, and to limit its liability for damages, in connection with a fire caused by sparks from the steamer's smokestack. Because the fire occurred on land, claims for resulting damages fell outside federal admiralty jurisdiction as then defined. *Id.* at 618-619. See *The Plymouth*, 70 U.S. (3 Wall.) 20, 35 (1865). The Court noted that the predecessor of Section 183(a) "[did] not purport to confer any jurisdiction upon a District Court" and that the predecessor of Section 185 referred only to "any court of competent jurisdiction," "leaving the question of such competency to depend on other provisions of law." 118 U.S. at 617. The court held, accordingly, that neither the Limitation of Liability Act nor the Admiralty Rules promulgated by the Court extended the general admiralty jurisdiction of the district courts to a proceeding to limit a vessel owner's liability for a non-maritime tort. The Court added that nothing in its earlier decisions "support[ed] the view that a District Court can take jurisdiction in admiralty of a petition for a limitation of liability where it would not have had cognizance in admiralty originally of the cause of action involved." *Id.* at 624.

Similarly, in *Butler* v. *Boston Steamship Co.*, 130 U.S. 527, 557 (1889), the Court observed that "the law of limited liability of shipowners is a part of our maritime code," and "is necessarily coextensive with that of the general admiralty and maritime jurisdiction." Under the regime of *Norwich*, *Ex parte Phenix*, and *Butler*, therefore, the scope of the liabilities subject to the Limitation of Liability Act was defined by reference to the general admiralty jurisdiction of the federal courts.

In *Richardson* v. *Harmon*, *supra*, however, the Court uncoupled the Limitation of Liability Act from general admiralty jurisdiction. In that case, the owners of a steam barge sought to limit their liability arising out of a collision

between the barge and a bridge. Because the bridge was considered to be "on land" for purposes of admiralty jurisdiction, a claim for damage to the bridge was non-maritime under the "locality" test of *The Plymouth*, *supra*. The Court acknowledged that, prior to the effective date of an 1884 amendment to the Limitation of Liability Act (an amendment now codified at 46 U.S.C. App. 189), the district court would have had no jurisdiction to limit the barge owner's liability for damage to the bridge. However, the Court construed the 1884 amendment to extend the Limitation of Liability Act–and, implicitly, federal jurisdiction in proceedings under the Act–to "'any and all debts and liabilities' not theretofore included"–including non-maritime tort claims. 222 U.S. at 105. "Thus construed," the Court explained, "the section harmonizes with the policy of limiting the owner's risk to his interest in the ship in respect of all claims arising out of the conduct of the master and crew, whether the liability be strictly maritime or from a tort non-maritime, but leaves him liable for his own fault, neglect and contracts." *Id.* at 106.

After *Richardson*, it was frequently held that "[p]roceedings by vessel owners to limit their liability as permitted by [the Limitation of Liability Act] are within the admiralty jurisdiction even if the claims limited against might not be sued upon in admiralty." 1 S. Friedell, *Benedict on Admiralty* § 225 (7th ed. 1988). See *Just* v. *Chambers*, 312 U.S. at 386 (Limitation of Liability Act "extends to tort claims even when the tort is non-maritime"); *The No. 6*, 241 F. 69 (2d Cir. 1917); *The Rochester*, 230 F. 519, 521 (W.D.N.Y. 1916); *The Irving F. Ross*, 8 F.2d 313 (D. Mass. 1923); *In re Highland Nav. Corp.*, 24 F.2d 582 (S.D.N.Y. 1927); *The Atlas No. 7*, 42 F.2d 480 (S.D.N.Y. 1930); *In re Colonial Trust Co.*, 124 F. Supp. 73,

75 (D. Conn. 1954); *The Trim Too*, 39 F. Supp. 271, 273 (D. Mass. 1941).[7]

By contrast, the court of appeals' decision in this case holds that the Limitation of Liability Act is restricted to maritime tort liabilities over which federal jurisdiction would lie under 28 U.S.C. 1333. The Eleventh Circuit has since reached the same conclusion on very similar facts. *Lewis Charters, Inc.* v. *Huckins Yacht Corp.*, 871 F.2d 1046 (11th Cir. 1989).[8] These decisions are inconsistent with the Second Circuit's decision in *The No. 6*, *supra*, and district court decisions that have followed *Richardson*.

The decisions in this case and *Lewis Charters* have suggested that *Richardson* is no longer controlling in light of two intervening developments in the scope of admiralty tort jurisdiction: (1) the enactment of the Extension of Admiralty Act, 46 U.S.C. 740, which extends the original maritime jurisdiction of the district courts to "all cases of damage or injury, to person or property, caused by a vessel on navigable water, notwithstanding that such damage or injury be done or consummated on land," and (2) this Court's decisions, in *Executive Jet* and *Foremost*, requiring a "significant relationship to traditional maritime activity" for federal admiralty jurisdiction, see pp. 16-17, *infra*.

---

[7] In 1936, Congress amended the Act by adding the provision now codified at 46 U.S.C. App. 185. That amendment dealt with some of the procedural matters that had previously been addressed only by the Admiralty Rules. There is no indication in the language of the Section or its history that it was intended to alter the jurisdictional regime established by *Richardson* v. *Harmon*. See H.R. Rep. No. 2517, 74th Cong., 2d Sess. (1936); S. Rep. No. 2061, 74th Cong., 2d Sess. (1936).

[8] There were two similar district court decisions prior to the decision in this case. *Clinton Board of Park Commissioners* v. *Claussen*, 410 F. Supp. 320 (S.D. Iowa 1976); *Yacht Calibria*, 1975 A.M.C. 981 (D. Md. 1975).

We disagree. In our view, *Richardson* squarely rejected the proposition that district courts may not take jurisdiction over non-maritime tort claims in limitation of liability proceedings. The fundamental basis for that holding, the 1884 amendment to the Limitation of Liability Act, remains on the books as 46 U.S.C. App. 189. And, *Executive Jet* expressly recognized that the "significant relationship to traditional maritime activity" standard would not apply when there was "legislation to the contrary." 409 U.S. at 268, 274 & n.26.[9]

We believe that the conflict between the court of appeals' decision and *Richardson* warrants further review. The effort of the court below to distinguish *Richardson* does not stand in isolation; the court's approach is already being followed by the Eleventh Circuit. And a number of lower court decisions, especially involving pleasure boat incidents, have sought to limit the reach of the Limitation of Liability Act in ways that seem to us hard to square with *Richardson*'s rationale (see notes 10, 12, *infra*).

If the Court decides to hear this case, there are several reasons why it may wish to direct the parties to address the question whether *Richardson* should be modified or overruled. First, the original basis for that decision is subject to question. Notwithstanding its open-ended language, the Limitation of Liability Act was initially understood to be a part of the "maritime code" and thus to be coextensive with the general admiralty jurisdiction of the federal courts. See pp. 7-9, *supra*. The language of the 1884 amendment on which *Richardson* was based does not seem to justify a

[9] To be sure, *Richardson* involved the rule excluding from maritime tort jurisdiction injuries occurring on "land," rather than the "significant relationship" standard that the court of appeals applied here. However, we believe that the reasoning of *Richardson* does not support a distinction between these two criteria.

fundamentally different view of the relationship between the Act and that jurisdiction.[10] Second, insofar as the extension of the Act to non-maritime claims in *Richardson* was based on concern with artificial limitations on admiralty jurisdiction arising from the "locality" test, the Extension of Admiralty Act has ameliorated that concern. Third, as the court of appeals noted, the "great object of the [Limitation of Liability Act] was to encourage ship-building and to induce capitalists to invest money in this branch of industry." *Norwich Co.* v. *Wright*, 80 U.S. (13 Wall.) at 121. See 3 A. Jenner & J. Loo, *Benedict on Admiralty* §§ 6-7 (7th ed. 1988). That purpose was the principal basis for the

[10] The original Act, codified at 46 U.S.C. App. 183(a), limited the vessel owner's liability for "any act, matter, or thing, loss, damage, or forfeiture, done, occasioned, or incurred, without the privity or knowledge of such owner" to "the amount or value of the interest of such owner in such vessel, and her freight then pending." The 1884 amendment, codified at 46 U.S.C. App. 189, limited the shipowner's liability "to the proportion of any or all debts and liabilities that his individual share of the vessel bears to the whole." The sparse legislative history of the provision, while suggesting that the amendment was intended to provide protection from contractual liability, 15 Cong. Rec. 3971 (1884) (remarks of Senator Vest), does not indicate a substantial increase in the Act's scope. See *Butler* v. *Boston S.S. Co.*, 130 U.S. at 554 (suggesting that it was "possible" that the amendment "was intended to remove all doubts of the application of the limited liability law to all cases of loss and injury caused without the privity or knowledge of the owner").

Even after *Richardson*, the courts have refused to apply the Limitation of Liability Act to cases having no relationship to navigable waters. *E.g.*, *In re Three Buoys Houseboat Vacations U.S.A., Ltd.*, 878 F.2d 1096 (8th Cir. 1989); *Marroni* v. *Matey*, 492 F. Supp. 340 (E.D. Pa. 1980); *In re Howser's Petition*, 227 F. Supp. 81 (W.D.N.C. 1964); *In re Madsen's Petition*, 187 F. Supp. 411 (N.D.N.Y. 1960); *In re Stephens*, 341 F. Supp. 1404 (N.D. Ga. 1965). These decisions are difficult to square with *Richardson*. We believe that they reflect a reluctance to sever completely any tie between the Limitation of Liability Act and general admiralty jurisdiction.

decision in *Richardson*. Under the "locality" test for admiralty jurisdiction that then prevailed, restricting limitation of liability proceedings to claims cognizable in admiralty would have left shipowners exposed to many foreseeable claims arising from the normal commercial operation of their vessels. By contrast, allowing limitation of liability for claims arising from wrongs having no "significant relationship to traditional maritime activity" seems unnecessary to advance the interests of the merchant marine.[11] Finally, because the jurisdiction of the limitation court in cases of this type is exclusive, the consequence of federal jurisdiction is to subject tort claims arising under state law to the statutory cap and to bring them to federal court. In a case that does not satisfy the "significant relationship" test, any federal interest in the scope of a shipowner's liability for such claims or in adjudication of that liability in a federal forum is attenuated.

We by no means suggest that the question is one-sided. The language of the Limitation of Liability Act does not expressly limit it to maritime claims. Thus, as was the case prior to *Richardson*, such a limitation would have to be derived from the original understanding of the Act's relation to the admiralty jurisdiction of the courts responsible for the Act's administration. Moreover, a very broad view of the Act's purpose of advancing commercial shipping might support its application to non-maritime liabilities; if so, federal courts should have jurisdiction over such claims in order to perform their function of assuring a comprehensive adjudication of multiple claims against a

[11] See also *Maryland Casualty Co.* v. *Cushing*, 347 U.S. 409, 437 (1954) (Black, J., dissenting) ("Judicial expansion of the Limited Liability Act at this date seems especially inappropriate. Many of the conditions in the shipping industry which induced the 1851 Congress to pass the Act no longer prevail.").

shipowner and an orderly distribution of the sum earmarked for his liabilities. See *Maryland Casualty Co.* v. *Cushing*, 347 U.S. 409, 416 (1954); *Just* v. *Chambers*, 312 U.S. at 385-386; *Hartford Accident & Indemnity Co.* v. *Southern Pacific Co.*, 273 U.S. 207, 215-216 (1927). On balance, however, we believe that the concerns raised by *Richardson* are sufficient to warrant reconsideration of that decision.[12]

[12] As the court of appeals noted (Pet. App. 20a n.11), there is a conflict on the question whether the Limitation of Liability Act applies to pleasure yachts. The weight of authority supports such application. *In re Hechinger*, 890 F.2d 202 (9th Cir. 1989); *In re Young*, 872 F.2d 176 (6th Cir. 1989); *Gibboney* v. *Wright*, 517 F.2d 1054 (5th Cir. 1975); *The Oneida*, 282 F. 238 (2d Cir. 1922); *Feige* v. *Hurley*, 89 F.2d 575 (6th Cir. 1937); *Warnken* v. *Moody*, 22 F.2d 960, 962 (5th Cir. 1927); *In re Brown*, 536 F. Supp. 750 (N.D. Ohio 1982); *Armour* v. *Gradler*, 448 F. Supp. 741, 748-750 (W.D. Pa. 1978); *In re Theisen*, 349 F. Supp. 737 (E.D.N.Y. 1972); *In re Klarman*, 295 F. Supp. 1021 (D. Conn. 1968); *In re Landi*, 194 F. Supp. 353 (S.D.N.Y. 1960); *In re Reading*, 169 F. Supp. 165 (N.D.N.Y. 1958), aff'd, 271 F.2d 959 (2d Cir. 1959); *In re Colonial Trust Co.*, 124 F. Supp. at 75; *The Trim Too*, 39 F. Supp. at 273. See 3 A. Jenner & J. Loo, *supra*, § 47, at 5-43 to 5-44 & n.5. Cf. *Coryell* v. *Phipps*, 317 U.S. 406 (1943); *Just* v. *Chambers*, *supra* (apparently assuming that the Act applied to pleasure boats). However, a growing number of district court decisions have held to the contrary. *Estate of Lewis*, 683 F. Supp. 217 (N.D. Cal. 1987); *In re Shaw*, 668 F. Supp. 524 (S.D.W. Va. 1987); *In re Lowing*, 635 F. Supp. 520 (D. Mich. 1986); *In re Tracey*, 608 F. Supp. 263 (D. Mass. 1985); *Baldassano* v. *Larsen*, 580 F. Supp. 415 (D. Minn. 1984); *Kulack* v. *The Pearl Jack*, 79 F. Supp. 802 (W.D. Mich. 1948). See also *The Mamie*, 5 F. 813 (E.D. Mich.), aff'd on other grounds, 8 F. 367 (C.C.E.D. Mich. 1881).

In our view, the text of the Act strongly supports the conclusion that it applies to pleasure boats. By its terms, Section 183(a) extends the benefits of the Act to "the owner of any vessel" who can satisfy its other conditions. Section 188 provides that the Act shall apply to "all seagoing vessels, and also to all vessels used on lakes or rivers or in inland navigation, including canal boats, barges and lighters." For purposes of the United States Code, the term "vessel" includes "every description of watercraft or other artificial contrivance used, or capable of being used, as a means of transportation on water." 1 U.S.C. 3.

2. If the Limitation of Liability Act applies only to tort liabilities that bear a "significant relationship to traditional maritime activity," this case would present the question of the application of that standard.[13] That question in turn would require consideration of this Court's decisions in *Executive Jet*, and *Foremost*, *supra*.

In *Executive Jet*, this Court held that unless the "wrong" involved in a plane crash bears "a significant relationship to traditional maritime activity," claims arising from the crash "are not cognizable in admiralty in the absence of legislation to the contrary." 409 U.S. at 268; see *id.* at 274. In *Foremost*, a case involving a collision between two pleasure boats, the Court established that this "significant relationship" standard applies outside the aviation context (at least where the tort does not occur on the high seas) but also made clear that "there is no requirement that 'the maritime activity be an exclusively commercial one.'" 457 U.S. at 674. The Court held that "[i]n light of the need for uniform rules governing navigation, the potential impact on maritime commerce when two vessels collide on navigable waters, and the uncertainty and confusion that would necessarily accompany a jurisdictional test tied to the commercial use of a given boat, * * * a complaint alleging

---

Finally, Section 183(f) provides that for purposes of Sections 183(b)-(e) and 183b, the term "seagoing vessel" does not include "pleasure yachts." The strong implication of this language is that "pleasure yachts" are not excluded *per se* from the category of vessels to which Section 183(a) applies.

Thus, while there are compelling policy arguments against application of the Limitation of Liability Act to pleasure yachts, those arguments appear to be foreclosed by the language of the Act.

[13] We assume that all claims as to which petitioner seeks the benefits of the Limitation of Liability Act sound in tort. The "significant relationship" test in *Executive Jet* and *Foremost* applies only to such claims.

a collision between two vessels on navigable waters properly states a claim within the admiralty jurisdiction of the federal courts." *Id.* at 677.

Foremost did not describe the nature of the "significant relationship to traditional maritime activity" that would suffice to support jurisdiction in cases, like this one, that do not involve the navigation of vessels. In determining whether such a relationship exists, most courts of appeals have adopted some variant of the four-factor test first recognized by the Fifth Circuit in *Kelly* v. *Smith*, 485 F.2d 520, 525 (1973), cert. denied, 416 U.S. 969 (1974). Under that test, a court considers (485 F.2d at 525)

> the functions and roles of the parties; the types of vehicles and instrumentalities involved; the causation and type of injury; and traditional concepts of the role of admiralty law.[14]

In this case, the panel majority expressly rejected that test, saying that it was not "helpful in developing the kind of analysis indicated by *Executive Jet* and *Foremost*." Pet. App. 8a n.2. Instead, it concluded that in the absence of

---

[14] See, *e.g.*, *Drake* v. *Raymark Industries, Inc.*, 772 F.2d 1007, 1015-1016 (1st Cir. 1985); *Eagle-Picher Indus., Inc.* v. *United States*, 846 F.2d 888, 896 (3d Cir. 1988); *Oman* v. *Johns-Manville Corp.*, 764 F.2d 224, 230 (4th Cir. 1985); *Woessner* v. *Johns-Manville Sales Corp.*, 757 F.2d 634, 639-649 (5th Cir. 1985); *Guidry* v. *Durkin*, 834 F.2d 1465, 1471 (9th Cir. 1987); *In re Paradise Holdings, Inc.*, 795 F.2d 756, 759 (9th Cir. 1986); *Myhran* v. *Johns-Manville Corp.*, 741 F.2d 1119, 1121 (9th Cir. 1984); *Harville* v. *Johns-Manville Products Corp.*, 731 F.2d 775, 783-787 (11th Cir. 1984).

The First and Fifth Circuits have refined the last of the four factors. In its place, they now consider "(1) the impact of the event on maritime shipping and commerce (2) the desirability of a uniform national rule to apply to such matters and (3) the need for admiralty 'expertise' in the trial and decision of the case." *Molett* v. *Penrod Drilling Co.*, 826 F.2d 1419, 1426 (5th Cir. 1987); see *Shea* v. *Rev-Lyn Contracting Co.*, 868 F.2d 515, 518 (1st Cir. 1989).

a direct effect on maritime commerce, admiralty jurisdiction should extend only to those activities that (1) have a potentially disruptive impact on commercial shipping *and* (2) involve navigation. *Ibid.* There is thus a conflict among the circuits on the standards being applied to determine the existence of the "significant relationship" required to sustain admiralty jurisdiction over tort claims.[15]

Though the "four factor test" seems to envisage that admiralty jurisdiction will be available to a greater degree than under the Seventh Circuit's approach, it is difficult to ascertain at this juncture the extent to which these conflicting approaches will actually lead to differing results. In keeping with this Court's emphasis in *Foremost* on the "need for uniform rules governing navigation," even those courts committed to the "four-factor test" have placed great emphasis on allegations that an injury has arisen from an error in navigation. When a complaint has included such allegations, the courts have usually found jurisdiction even in cases involving the operation of non-commercial vessels.[16]

---

[15] *American Eastern Devel. Corp.* v. *Everglades Marina, Inc.*, 608 F.2d 123 (5th Cir. 1979), on which petitioner relies heavily (Pet. 8-10), is not on point; that case arose in contract rather than in tort.

[16] *Hogan* v. *Overman*, 767 F.2d 1093, 1094 (4th Cir. 1985) (admiralty jurisdiction extends to suit by waterskier against operator of tow boat on ground that "negligent operation of a vessel is alleged"); *Oliver by Oliver* v. *Hardesty*, 745 F.2d 317 (4th Cir. 1984) (suit by swimmer against operator of boat); *Medina* v. *Perez*, 733 F.2d 170 (1st Cir. 1984) (admiralty jurisdiction extends to suit by swimmers against small powerboat since suit involves navigation, "the most fundamental" of maritime activities); *Finneseth* v. *Carter*, 712 F.2d 1041 (6th Cir. 1983) (collision between pleasure craft on lake formed by a dam); See also *Souther* v. *Thompson*, 754 F.2d 151 (4th Cir. 1985) ("allegation of a navigational error appears to be the key to admiralty jurisdiction when dealing with small pleasure craft;" jurisdiction found lacking because accident at issue did not "arise out of an alleged navigational error"); *St. Hilaire Moye* v. *Henderson*, 496 F.2d 973, 979 (8th Cir.) ("the operation of a boat on navigable waters, no matter what its size or activity, is a traditional maritime activity to which the admiralty jurisdiction of the federal courts may extend"), cert. denied, 419 U.S. 884 (1974).

Conversely, the courts have been reluctant to find jurisdiction in cases, like this one, in which an injury has not arisen from an alleged navigational error. See *Lewis Charters, Inc.* v. *Huckins Yacht Corp.*, 871 F.2d 1046 (11th Cir. 1989); *Lloyds of London* v. *Montauk Yacht Club & Inn*, 704 F. Supp. 1175 (E.D.N.Y. 1989).[17]

Thus, the practical significance of the differing standards being employed in the courts of appeals remains unclear. Nevertheless, we believe that the conflict calls for this Court's review. The conflict has been perceived as significant. One court has criticized the approach applied by the panel here as "an indefensibly narrow reading of *Foremost Insurance.*" *In re Young*, 872 F.2d 176, 178-179 n.4 (6th Cir. 1989). Moreover, although joining in the court's judgment, the concurring judge on the panel also expressed concern that its test would "place inappropriate restrictions on admiralty jurisdiction in other instances." Pet. App. 21a (Ripple, J., concurring). Because *Foremost* provides modest guidance with respect to cases that do not involve navigation or commercial shipping, it seems likely that dispute and uncertainty over the content of the "significant relationship" test will persist if the matter does not receive this Court's attention.[18] Such uncertainty over the

---

[17] In *Lewis Charters*, the Eleventh Circuit applied the four-factor test described above to a claim by the owner of a marina against a boat owner whose negligence was allegedly responsible for a fire. The court reached the same result as the court of appeals in this case.

[18] The petition also presents the question whether jurisdiction could be founded upon the Extension of Admiralty Act, 46 U.S.C. 740. However, that issue was not raised or decided in the court of appeals

proper scope of admiralty jurisdiction and maritime law runs counter to the interest of courts and litigants in the expeditious determination of controversies on their merits. See Z. Chafee, *Some Problems of Equity* 310-316 (1950).

CONCLUSION

The petition for a writ of certiorari should be granted. Respectfully submitted.

KENNETH W. STARR
Solicitor General
DAVID L. SHAPIRO
Deputy Solicitor General
STEPHEN L. NIGHTINGALE
Assistant to the Solicitor General

JANUARY 1990

---

or the district court.

☆ U.S. GOVERNMENT PRINTING OFFICE: 1990—[illegible]